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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 723

L. E. (PRINCE) WALES, D/B/A WALES TRUCKING COMPANY, ET AL.,

vs. *Complainants,*

UNITED STATES OF AMERICA, ET AL.,
Defendants

APPELLEES' STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellees E. L. Farmer & Company, Rogers Truck Line, O. H. McAlister, Alton Leander McAlister, Hunsaker Trucking Contractor, Inc., Eagle Trucking Company, B. F. Walker, Inc., Joe D. Hughes, Inc., C. L. Bell, D. E. McAlister, T. E. Mercer Teaming and Trucking Contractor and Younger Bros.—J. M. English Truck Lines, Inc., submit herewith their statement in opposition to appellants' jurisdictional statement. Appellees include herein their motion to dismiss the appeal or in the alternative to affirm the judgment of the District Court on the grounds that appellants' jurisdictional statement does not present any grounds upon which it is contended that the questions in-

volved are substantial and that as a matter of fact the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, appellees assert that there has been no showing and no attempt to show by appellants that the questions involved are substantial. Appellees further assert that it is apparent that the questions involved are so wanting in substance as not to need further argument and have been so plainly foreclosed by the decisions of the Supreme Court as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

Questions Presented

While appellants' jurisdictional statement fails to specify what questions are involved or upon what grounds they are considered substantial, the nature of appellants' assignments of error, disregarding the purely argumentative matter contained therein, indicates that there are four possible questions presented. The first question is whether the fact that the hearings before the Interstate Commerce Commission were not presided over by an examiner appointed as provided in the Administrative Procedure Act renders the order of the Commission predicated thereon void, even in the absence of timely objection. The second question is whether the practice and procedure followed by the Commission in consolidating certain of the related applications for hearing and in disposing of the 18 related applications in a single report and order deprived appellants of a full, fair and impartial hearing. The third question is whether the findings and conclusions of the Commission are supported by substantial evidence. The fourth question is whether the action of the Commission in refus-

ing to reopen the proceedings for rehearing was a proper exercise of the discretion of the Commission.

It is readily apparent that the questions involved are not substantial and that the same or essentially similar questions have been considered by the Surpeme Court in recent decisions and numerous previous decisions, and have been so plainly foreclosed by such decisions as to make further argument unnecessary.

I

The Question of Whether, in the Absence of Timely Objection, the Fact That the Examiner Presiding Over the Hearings Was Not Appointed as Provided in the Administrative Procedure Act Is Such a Defect as Would Invalidate and Render Null and Void the Resulting Order of the Commission Is Plainly Foreclosed Against Appellants by the Decision of the Supreme Court in United States of America, et al., v. L. A. Tucker Truck Lines, Inc., 344 U. S. 33.

Appellants'[1] first and second assignments of error contend that the District Court erred in refusing to set aside and vacate the orders of the Interstate Commerce Commission because the examiner who presided over the hearings had not at the time been appointed and qualified pursuant to the Administrative Procedure Act.

These assignments thus raise the question of whether or not the matter of the examiner's appointment is such a defect as would invalidate and render null and void the resulting orders of the Commission based on said hearings, even in the absence of timely objection. Complainants in this proceeding did not seasonably object to the examiner's appointment or qualifications at or during the hearings.

[1] Also referred to herein as complainants.

and it was not until approximately two years after the hearings were closed that complainants, in a petition for reconsideration, first raised the question.

The recent decision of the Supreme Court in *United States of America, et al.*, v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (hereafter referred to as the *Tucker* case), decided November 10, 1952, determines this issue squarely against the contentions of complainants. On the specific question here involved the Court held as follows:

> "The question not being foreclosed by precedent, we hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made *during the hearings*.[2] But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity."

In view of this decision in the *Tucker* case, and the facts (which will be hereafter briefly reviewed) existing in the instant proceeding, it is clear that the alleged defect in the appointment of the examiner was a mere irregularity which in no way deprives the Commission of power or jurisdiction or invalidates the resulting orders, and does not present any substantial question herein for decision.

The Administrative Procedure Act was passed by Congress on June 11, 1946, approximately 2½ years prior to the filing of these applications in the latter part of 1948. Notice of the filing of the applications was at that time forwarded by the applicants to complainants and/or their predecessors. The Commission assigned the applications for hearing at Dallas commencing April 18, 1949, before one of its examiners, Clarence E. Simmons, and due notice

[2] Italicizing here and throughout this brief is ours unless otherwise indicated.

of this assignment was forwarded by the Commission to complainants. These complainants or their predecessors, through their attorneys and representatives, took a very active part in the hearing at Dallas and later at Denver, but made no objection whatsoever to the qualifications of the presiding examiner and made no request of any kind that the applications be heard before an examiner appointed as provided in the Administrative Procedure Act.

After the hearing was closed, complainants and other parties were given the opportunity of filing briefs before the examiner, and they availed themselves of this opportunity and filed voluminous briefs, but no objection or mention of the appointment of the hearing examiner was made. Upon the issuance of the examiner's recommended report and order, applicants (appellees herein) filed exceptions thereto, and in their replies complainants commended the examiner and urged the Commission to accept and affirm his report and recommended order. No objections were raised by complainants in these instruments as to the qualifications of the examiner. It was not until after Division 5 of the Commission had issued its report and order of June 11, 1951, subsequently affirmed by the entire Commission, that complainants attempted to raise the question of the examiner's appointment.

Complainants sat silent on the examiner question throughout these whole proceedings and took the chance of a favorable decision on the record as made. This constitutes a fatal lack of diligence and in view of the decision in the *Tucker Case* complainants cannot raise this question now. Otherwise, complainants would have a double-barrelled weapon in opposing the applications; first, they could sit idly by while the proceedings were being processed and gamble on a favorable decision of the Commission, in which case they would have no need to raise the hearing examiner question but would indeed affirm the validity of the

proceeding; second, complainants could wait and see how they fared before the Commission, as they did in this proceeding, and then, after the Commission had issued a report and order unfavorable to complainants, attempt to bring forth the examiner question for the first time.

The complacency of the appellees in this respect obviously stems from the fact that they were not actually prejudiced by the conduct or manner of appointment of the examiner. As a matter of fact, the examiner's report was favorable to complainants, and complainants received the benefit of his recommendations in their favor, thus placing on appellees the task of showing that the examiner erred in his findings and conclusions, and thereafter complainants urged upon the Commission that it should have affirmed the recommended report and order of the examiner. Complainants thus contended practically throughout the proceeding that the examiner was qualified and that his report should be accepted as the order of the Commission, but not having prevailed in this position complainants belatedly reversed themselves and attempted to attack the validity of the hearing due to the technicality of the appointment of the examiner.

This complacency of the complainants in raising the question of the appointment of the examiner and the lack of prejudice to them is strikingly similar to that exhibited in the *Tucker Case*, and the statement of the Supreme Court there is equally applicable in this proceeding:

> "The apparent reason for complacency was that it (appellee) was not actually prejudiced by the conduct or manner of appointment of the examiner. There is no suggestion that he exhibited bias, favoritism or unfairness. Nor is there ground for assuming it from the relationships in the proceeding. He did not act and was not expected to act both as prosecutor and judge. The Commission, which appointed him, did not insti-

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> tute or become a party in interest to the proceeding. Neither it nor its examiner had any function except to decide justly between contestants in an adversary proceeding. The issue is clearly an after thought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice."

In the *Tucker Case* the question of the examiner's appointment was raised for the first time in the District Court and was not raised before the Commission. The decision in that case holds, however, that the objection to the hearing examiner must be timely and seasonably made, and in this connection the Court stated:

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that Courts should not topple over administrative decisions unless the Administrative body not only has erred but has erred against *objection made at the time appropriate under its practice.*"

For the alleged defect in the examiner's appointment to be available to complainants in the instant proceeding, they would have had to make timely and appropriate objection, which means at or during the hearing and not two years thereafter, or in the language of the Court in the *Tucker Case*, ". . . the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearings."

It is therefore submitted that no substantial question is here presented and that this issue has been plainly foreclosed by the decision in the *Tucker Case*.

II

The Question of the Practice and Procedure Followed by the Commission in Consolidating the Related Applications and Disposing of Them in a Single Report Has Been Plainly Foreclosed Against Appellants by Such Decisions of the Supreme Court as U. S., et al., v. Pierce Auto Freight Lines, et al., 327 U. S. 515, and Other Cases Hereafter Cited.

The applications of these appellees were consolidated for hearing and heard on a joint record, and subsequently disposed of in a single report by the Commission together with the applications of six of the other motor carrier appellees, whose applications had also been consolidated for hearing and were heard at or immediately following the time of the hearings on these applications. Appellants assign as error the action of the District Court in upholding this procedure followed by the Commission, but appellees respectfully submit that the Commission simply followed well established and proper administrative procedures affording substantial justice to all parties.

Practically identical procedural questions were involved in *United States, et al.* v. *Pierce Auto Freight Lines, et al.*, 327 U. S. 515, for although the two applications there involved were not technically consolidated, the hearings were substantially coordinated and the Interstate Commerce Commission disposed of both applications in a single report. The Supreme Court held that obviously it was not sufficient ground for suspending the Commission's order that it chose to write one report rather than two, especially in

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matters so closely related, if the findings and evidence were sufficient to sustain the action taken, and specifically pointed out that it is not uncommon judicial practice to follow this course. The court pointed out that all of the parties were parties to both proceedings, were represented at all of the hearings which were conducted at substantially the same times and places, were given full opportunity to present all evidence they considered pertinent, to cross-examine witnesses and otherwise protect their interests; that large portions of the evidence applied as much to one application as to another, particularly the proofs relating to traffic conditions, shipper demands, the need for faster service and other items, and that under the circumstances it was difficult to see how the complaining parties could have sustained substantial prejudice from the Commission's consideration of the evidence upon matters as closely related as those in issue in the two proceedings. These considerations are equally applicable to the proceeding at bar, as is the following statement by the Court:

> "In the absence of any showing of specific prejudice, the claim comes down to the highly technical objection that the Commission, in the final stage of forming its judgment, could not in either case take account of what had been done in the other, notwithstanding the closely related character and objects of the applications and the prior proceedings. The contention in its farthest reach amounts to legal version of the scriptural injunction against letting one's right hand know what one's left may be doing."

In the proceedings here involved, all the applicants before the Commission were oil field haulers, all domiciled in Texas, all engaged in general oil field transportation operations in the south and southwest. All the applications involved extension of operating authority to and between

points in the same or similar territory in the Rocky Mountain area. All the applications sought authority to transport the same commodities and it is obvious that the same evidence applied to and was material to all. The applications were all filed at or during the same period of time and consequently common parties, common issues, and common or related questions of fact and law were involved and were before the Commission at the same time.

It is apparent that the Commission, in determining public convenience and necessity and applying the national transportation policy, must necessarily determine the transportation conditions and transportation needs existing in the territory to be served, and then through the application of its expert judgment and experience in and knowledge of interstate transportation matters determine whether or not additional motor carrier service is required. Public transportation need is a fact and not something that can belong to any applicant or group of applicants, and is established and determined by proof of transportation conditions existing in the territory to be served. Clearly the Commission, with the involved applications before it, could not close its eyes to the fact that similar applications involving the same territory, same commodities and the same issues were also before it at the same time.

Under these circumstances, it is clear that large portions of the evidence before the Commission applied as much to one application or group of applications as to another, that the procedure followed was proper administrative practice on the part of the Commission and assisted it in determining the public transportation needs and conditions existing in the territory involved, and that having determined the public need for additional transportation service the Commission correctly determined—based on its expert judgment and knowledge of transportation mat-

ters,—that this public need would best be served by granting the applications of the defendants and authorizing them to perform a transportation service from Texas into the Rocky Mountain States and return similar to the transportation service now being performed by them for the petroleum industry in the south and southwest.

Under such circumstances the consolidation of these applications for hearing and disposition thereof in a single report was clearly proper administrative procedure, and there has been no showing of prejudice to complainants. Complainants were parties to all proceedings, were represented at all the hearings, were given the opportunity of full direct and cross-examination of all witnesses and were given full opportunity to present all evidence they considered pertinent and otherwise protect their interests. Clearly they were not deprived of any substantial rights.

As pointed out in the instant opinion of the District Court, the practice of consolidating similar proceedings has been approved in such cases as *Central Transfer Company* v. *Term RR. Company*, 288 U. S. 469; *Trade Commission* v. *Cement Institute*, 333 U. S. 683; *Meeker* v. *Lehigh Valley*, 236 U. S. 434, and *U. S., et al.* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515. Also as there pointed out by the District Court, such action eliminates costly duplication in the presentation of evidence and affords opportunity of more expeditious disposition of the proceeding.

Appellees therefore assert that this question is so unsubstantial as not to need further argument and has been plainly foreclosed against appellants' contentions.

III

The Findings and Conclusions of the Commission Are Supported by Substantial Evidence and the Granting of the Certificates Is a Reasonable and Valid Exercise of the Judgment and Authority of the Commission, and No Substantial Question Is Presented in Connection Therewith.

We are unable to see wherein there is any substantial question presented in connection with the evidence in support of the Commission's findings and conclusions or the authority and discretion of the Commission to issue the involved certificates in the premises. The principles governing proceedings of this type are clear and well established, and the somewhat voluminous record before the Commission, considered as a whole, clearly contains reliable, probative and substantial evidence in support of the Commission's findings.

Extensive hearings were conducted on the applications, and at the hearings representatives of a large number of oil companies, refining companies, oil well drilling contractors, pipe line contractors, and various oil field equipment manufacturing and supply companies testified concerning their experiences and transportation difficulties in their past and present operations in the Rocky Mountain states, and their expanding future operations in the area. In this connection, the District Court in its opinion stated:

> "Voluminous testimony, covering thousands of pages, was introduced in the hearing before us, and such testimony discloses that there is ample testimony to support the findings of the Commission in overruling the recommendation of the Examiner, and in granting the certificates sought. Such testimony included persons entirely familiar with the incoming oil fields in the mentioned states, with the exception of one or two of such states, and with the vast number of trucks that

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> are required to carry heavy oil drilling and oil developing machinery. Also covering leases that had been made in these particular territories, which, of course, carry expiration dates and necessity for development without delay."

Further on the Court said:

> "... No one can study the great oil sands which come down from Montana all through the states involved here, into Colorado, and on down through Texas, without realizing that the development which is now taking place there, and which is being richly rewarded by paying wells, can be expected to be satisfied and sufficiently supplied by motor carriers as now licensed. That very question was a controversial one and it has been settled by the satisfactory amount of evidence which was considered by the Commission."

And further:

> "The testimony showing the trend of new development and exploration in the oil fields, with their extensive acreage and outstanding leases, and large-scale exploratory operations, together with the great production, furnishes a substantial foundation for the judgment of the Commission. United States v. Carolina Freight Carriers, 315 U. S. 475; Warehouse Co. v. United States, 283 U. S. 501; McLean Trucking Co., Inc. et al v. United States, et al, 321 U. S. 67; Capitol Transit Co. v. United States et al 97 F. (s) 614; Lang Transportation Corp. et al v. United States, et al, 75 F. (s) 918; Interstate Commerce Commission, et al v. Parker, et al, 326 U. S. 60."

Part of the evidence necessarily relates to the future but it must be remembered that the statute (Title 49, U. S. Code, Section 307) authorizes the Commission to issue a certificate on the basis of not only the present, but also the future, public convenience and necessity. In this connec-

tion, in *United States* vs. *Detroit and Cleveland Navigation Co.*, 326 U. S. 236, 241, the Supreme Court said:

> "* * * The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission v. Parker*, 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See *Chesapeake & Ohio R. Co. v. United States*, 283 U. S. 35, 42; *Alton R. Co. v. United States*, 315 U. S. 15, 23. Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. *It may be that the public interest requires that future shipping needs be assured rather than left uncertain.* The Commission has the discretion so to decide. It went no further here."

It seems apparent that no legal principles are here in dispute, but complainants simply disagree with the Commission and the District Court concerning the substantiality of the evidence supporting the action of the Commission. Both the Commission and the District Court have carefully reviewed the voluminous evidence and have arrived at conclusions contrary to the contentions of complainants.

Appellees therefore respectively assert that this question is so wanting in substance as not to need further argu-

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ment and has been foreclosed against appellants' contentions.

IV

The Action of the Commission in Denying Complainants' Petition for Rehearing Presents No Substantial Question and Has Been Plainly Foreclosed Against Appellants.

It is well settled that rehearings are not matters of right, but are pleas addressed to the discretion of the agency or body making the order. In the instant proceeding, particularly in view of the full and extensive hearings and the large record involved, the Commission acted well within its discretion in denying complainants' request for rehearing.

In *ICC et al., vs. City of Jersey City, et al.*, 322 U. S. 503, the Court stated at page 514:

> "One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion.

> And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body."

Prior to the decision of these applications by Division 5 of the Commission, complainants did not suggest that a further hearing should be held to bring the record up-to-date, but instead they relied on the record as made and urged that the Commission decide the applications in accord with the examiner's recommendations on this record. Under somewhat similar circumstances the Supreme Court in *United States* v. *Northern Pacific Railway Company*, 288 U. S. 490, 494, stated:

> "Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order."

As stated by the Supreme Court in *United States et al.*, v. *Pierce Auto Freight Lines, Inc., et al.*, 327 U. S. 515, it has been held consistently that rehearings before administrative bodies are addressed to their own discretion, and, "Only a showing of the clearest abuse of discretion could sustain an exception to that rule."

In this proceeding the Commission acted well within its discretion and did not err in overruling complainants' petition for rehearing, and the question thus presented in this respect is so wanting in substance as not to need further

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argument and has plainly been foreclosed against appellants' contentions.

Conclusion

WHEREFORE, appellees respectfully submit this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument and appellees respectfully move the Court to dismiss this appeal, or in the alternative, to affirm the decree dismissing the complaint entered below.

Respectfully submitted,

RALPH W. CURRIE,
EWELL H. MUSE, JR.,
MORGAN NESBITT,
Counsel for Named Appellees.

MAY 18, 1953.

Per Curiam Decision.

No. 723. WALES, DOING BUSINESS AS WALES TRUCKING CO., ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Texas. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *United States* v. *Tucker Truck Lines*, 344 U. S. 33; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241. *T. S. Christopher* for appellants. *Solicitor General Cummings* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; *R. E. Kidwell* for the Newsom Truck Line et al.; *Reagan Sayers* for Tex-O-Kan Transportation Co.; and *Ewell H. Muse, Jr.* for E. L. Farmer & Co. et al., appellees. Reported below: 108 F. Supp. 928.